UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 06-CV-12067-RCL

SOUTHERN UNION COMPANY,

Plaintiff

v.

LIBERTY MUTUAL INSURANCE COMPANY,

Defendant.

CONSOLIDATED REPORT AND RECOMMENDATION ON

PLAINTIFF'S MOTION FOR LEAVE TO FILE AMENDED COMPLAINT
(Docket # 11)

LIBERTY MUTUAL INSURANCE COMPANY'S MOTION FOR LEAVE TO SET UP COUNTERCLAIM BY WAY OF AMENDMENT
(Docket # 13)

and

MOTION FOR PROTECTIVE ORDER OF, IN THE ALTERNATIVE, FOR BIFURCATION OF THE ISSUES OF DUTY TO DEFEND AND INDEMNIFICATION
(Docket # 19)

ALEXANDER, M.J.

Plaintiff, Southern Union Company ("Southern Union"), alleges that Defendant, Liberty Mutual Insurance Company ("Liberty"), has refused to undertake Southern

Union's defense, in accord with an insurance policy, in a number of actions brought against it for contamination of various properties (hereinafter, the "underlying actions"). The underlying actions are currently pending in the United States District Court for the District of Rhode Island.

The crux of the instant motions is simply whether the issue of indemnification should proceed in this Court at this time. At its base, Southern Union avers that proceeding with the indemnification claim here would be prejudicial, in that a result inconsistent with the underlying actions may occur. Liberty, on the other hand, avers that effectively staying the issue of indemnification here would prejudice it because of duplicative discovery and possible spoliation of evidence. For the reasons set forth more fully below, this Court RECOMMENDS that the issue of indemnification be dismissed from these proceedings at this time.

Both Southern Union and Liberty move to amend their respective pleadings pursuant to the liberal pleading rules inherent in the Federal Rules of Civil Procedure; Fed. R. Civ. P. 15(a) and 13(f), respectively. Leave to amend, of course, should be freely given when justice so requires. O'Connell v. Robert Half Intern, Inc., 429 F. Supp. 2d 246, 251 (D. Mass 2006). A party will be entitled to amend its pleadings unless the opposing party can show prejudice, bad faith, or undue delay. Foman v. Davis, 371 U.S. 178, 182 (1962).

Southern Union seeks to amend its Complaint to delete its claim for indemnity without prejudice. Southern Union maintains that such an amendment is necessary because there currently exists no judgments or settlements against Southern Union in the underlying actions that would give rise to a present duty on Liberty's part to indemnify Southern Union. As such, because the issue of indemnification is inextricably tied to the underlying facts, should the instant action determine the issue before the facts are litigated in the underlying actions, inconsistent results may arise. Accordingly, Southern Union pleads, the indemnification claim is premature and its inclusion will only cause complication and delay to these proceedings.

Liberty opposes said proposed amendment and counters with its own motion for leave to amend, alternatively arguing that even if the Court allows Southern Union's motion and the indemnification claim is deleted, the Court may allow Liberty's motion and revive the indemnification issue through Liberty's counterclaim for declaratory relief. Liberty's principle contention is that the exclusion of the issue of indemnity at this stage of the proceedings would prejudice Liberty. Simply, it would be inefficient for all parties, and the Court, to not address factually related issues together, especially in light of certain spoliation issues that may arise. In addition, Liberty highlights the fact that it was Southern Union who brought this action, included a claim for indemnity in the Complaint, and asserted that said claim was ripe for adjudication. Liberty further

maintains that there is still an issue as to whether Liberty is even Southern Union's insurer.

It is perspicuous that, under Massachusetts law, the duty to defend and the duty to indemnify need not be adjudicated in the same proceeding. See, e.g. Boston Symphony Orchestra, Inc. v. Commercial Union Ins. Co., 545 N.E.2d 1156, 1158 (Mass. 1989) ("the duty to defend is . . . antecedent to, and independent of, the duty to indemnify"). However, Federal Courts have a duty to exercise jurisdiction over cases properly brought before them, absent "special" circumstances. See, Colorado River Water Conservation District v. United States, 424 U.S. 800, 817 (1976). In assessing the Court's duty to exercise jurisdiction over the indemnity claim in this matter, it is plain that the preeminent consideration is one of potential prejudice that turns on the Court's management of the litigation. The Supreme Court has aptly articulated the instant scenario as turning on the purview of "wise judicial administration." Id. at 817. While an appropriate ground for a court to decline the exercise of its jurisdiction, "wise judicial administration" is not granted the weight of principles of federalism and proper constitutional adjudication. Aetna Cas. & Sur. Co. v. Kelly, 889 F. Supp. 535, 539 (D.R.I. 1995). Accordingly, such a refusal to act requires "'the clearest of justifications.'" Id. (quoting Colorado River, 424 U.S. at 819).

After careful review of the parties' positions, conducting a hearing, and analyzing the law, this Court finds that, in accord with "wise judicial administration," refraining from adjudicating the indemnity issue at this time is the proper course. The decision here turns on the Court's discretion regarding what is the "fair" thing to do. Wilton v. Seven Falls Co., 515 U.S. 277 (1995). Indemnification issues are often stayed pending the results of underlying cases, particularly when the facts are not yet well-developed. See Metro. Prop. & Liab. Ins. Co. v. Kirkwood, 729 F.2d 61, 62-63 (1st Cir. 1984); Aetna, 889 F. Supp. at 540. The Court finds Judge Torres' analysis in both Aetna and Employers Mut. Cas. Co. v. PIC Contractors, Inc., 24 F. Supp. 2d 212, 218 (D.R.I. 1998), particularly instructive. Employers teaches that:

> when the coverage questions turn on factual issues presented in the underlying litigation, considerations of 'practicality and wise judicial administration' counsel against proceeding with the declaratory judgment case 'in order to avoid duplicative proceedings, to preserve the insured's prerogative to select the forum, and to avoid the risk of inconsistent judgments.'

24 F. Supp. 2d at 217 (quoting Aetna, 889 F. Supp. at 540).

As summarized in the motion papers, the underlying actions revolve around the existence of and injury from hazardous pollution due to the insured's activity, that the insured knew or should have known that its coal gasification wastes would cause personal injury or property damage and that the insured negligently and recklessly breached its duty to the plaintiffs by failing to provide notice of the areas where

disposal of the waste occurred. These issues of fact are, of course, to be determined in the underlying actions. Logically, then, for Liberty to be liable to Southern Union for indemnification, the factual issues surrounding the acts of the insured, as described above, must first be resolved.

If the factual issues in the underlying actions are litigated in two different courts, there is a serious danger of inconsistent results and, thus, severe prejudice to at least one of the parties. Liberty does provide an interesting argument, however. It avers that, and to distinguish this case from other cited, it is not yet known that Liberty is Southern Union's insurer. As such, Liberty argues that it stands in the shoes of an "ordinary" litigant and not in this shoes of an insurer litigant, which carries with it certain "special" responsibilities. Liberty, therefore, feels that it is entitled to full discovery in the current case in order to determine whether it is even the insurer, because if it is not, then the factual determinations of the underlying matters do not matter.

While this argument is certainly intriguing, it is misplaced. The parties concede that the issue of a duty to defend will procede in this litigation. With that issue will proceed discovery. As argued by the parties, the determination of a duty to defind is primarily based on not only the existence of an insurance policy, but also on the reading within the four-corners of that policy. Discovery, accordingly, even on just the duty

to defend, should yield results that will allow the parties to determine whether an insurance policy does exist and whether Liberty is that insurer. Adding discovery related specifically to indemnification does not add anything new to this basic need for discovery just to determine whether or not these is an insurance policy. Liberty, thus, is not prejudiced in that regard.

Liberty's other contention is that there may be a spoliation of evidence issue based on the age of at least one fact witness. Southern Union points to a pertinent Massachusetts case that explains "the insurer was paid to take the risk so that if, between two parties, prejudice due to loss of evidence or otherwise is to be suffered, the insurer must be the one to suffer. It cannot act for its own benefit to the prejudice of its insured." Am. Policyholders Ins. Co. v. Nyacol Prods., Inc., No. 918667, 1996 WL 1186779 at *1 (Mass. Super. Jan. 29, 1996) (internal citations omitted). While this Court acknowledges that Liberty disputes whether or not it is Southern Union's insurer, again, the issue should be readily clarified during the proceedings regarding the duty to defend. Should Liberty be found to not be Southern Union's insurer, then its spoliation concerns are moot as it will no longer be party to this proceeding. If, however, Liberty is in fact Southern Union's insurer, then the proposition outlined in Nyacol, which this Court endorses, applies to Liberty as the de facto insurer and not,

as it claims, an "ordinary" litigant. Either way, Liberty does not demonstrate sufficient prejudice to warrant proceeding with the issue of indemnification at this time.

In sum, this Court RECOMMENDS that the District Judge ALLOW Southern Union's motion to amend, DENY Liberty's motion to set up a counter claim, and DENY, as moot, Southern Union's motion for a protective or, in the alternative, to bifurcate.

SO ORDERED.

June 5, 2007
Date

/s/ Joyce London Alexander
United States Magistrate Judge

NOTICE TO THE PARTIES

The parties are hereby advised that under the provisions of Rule 3(b) of the Rules for United States Magistrate Judges in the United States District Court the District Court of Massachusetts, any party who objects to this proposed Report and Recommendation must file a written objection thereto with the Clerk of this Court within ten (10) days of the party's receipt of the Report and Recommendation. The written objections must specifically identify the proportions of the proposed findings, recommendations or report to which objection is made and the basis for such objection. The parties are further advised that the United States Court of Appeals for this Circuit has indicated that failure to comply with this rule shall preclude further appellate review. See Keating v. Sec'y of Health & Human Servs., 848 F.2d 271, 273 (1st Cir. 1988); United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986); Scott v. Schweiker, 702 F.2d 13, 14 (1st Cir. 1983); United States v. Vega, 687 F.2d 376, 378-79 (1st Cir. 1982); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 604 (1st Cir. 1980); see also Thomas v. Arn, 474 U.S. 140, 155 (1985), reh'g denied, 474 U.S. 1111 (1986).

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Reginald C. Lindsay, presiding

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